

Letter of Findings: 05-20120252; 99-20120340
Cigarette Tax
For Tax Periods July, August, and September 2011
Other Tobacco Products Tax
For Tax Periods January 1 through September 30, 2011

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ISSUE

I. Cigarette and Other Tobacco Products Tax – Imposition.

Authority: IC § 6-7-1-2; IC § 6-7-1-6; IC § 6-7-1-17; IC § 6-7-2-7; IC § 6-8.1-5-1; IC § 6-8.1-10-9; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Taxpayer's shareholders/officers protest the assessment of cigarette and tobacco products taxes.

STATEMENT OF FACTS

Taxpayer is an Indiana company (also referred to as "Company"), which purchased and distributed cigarettes and other tobacco products ("OTPs") in Indiana. The Indiana Department of Revenue ("Department") determined that Taxpayer failed to remit the taxes on cigarettes which it purchased during July, August, and September 2011. The Department also determined that Taxpayer failed to remit the taxes on OTPs which it purchased and distributed during January 1 through September 30, 2011. As a result, the Department assessed Taxpayer additional cigarette tax, other tobacco product tax, interest, and penalty. Taxpayer ceased its business operation in late 2011.

Taxpayer's shareholders, who are also the officers of Taxpayer, protested the Department's proposed assessments. An administrative hearing was conducted during which the representative of Taxpayer and the shareholders/officers explained the basis for the protest. This Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department determined that Taxpayer failed to remit the taxes on the cigarettes and OTPs, which it purchased. Thus, the Department assessed Taxpayer additional cigarette tax, other tobacco product tax, interest, and penalty.

Taxpayer and the shareholders/officers stated that "Company admits the liabilities as described above and does not protest them in this matter." Rather, the shareholders/officers contended, in relevant part, that:

[T]he shareholders, officers and possible responsible officers of the corporation do protest the liability and do so because Ball v. Indiana Department of Revenue (563 N.E.2d 522) (1990) says that there is no notice which is forwarded to responsible corporate officers since the Company has received a notice which is acknowledged herein. Thus, [the shareholders/officers] do hereby protest the liability as it may relate to them personally and in their capacity as officers [for] the Company. (Taxpayer and its shareholders' protest letter, page 2).

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

"Cigarette" is defined in IC § 6-7-1-2, which states:

Unless the context requires otherwise, "cigarette" shall mean and include any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material. Provided the definition in this section shall not be construed to include cigars. Excepting where context clearly shows that cigarettes alone are intended, the term "cigarettes" shall mean and include cigarettes, cigarette papers or wrappers, and tubes upon which a tax is imposed by sections 12 and 13 of this chapter.

"Distributor" is defined in IC § 6-7-1-6, as follows:

Unless the context requires otherwise, "distributor" shall mean and include every person who sells, barter, exchanges, or distributes cigarettes in the state of Indiana to retail dealers for the purpose of resale, or who purchases cigarettes directly from a manufacturer of cigarettes, or who purchases for resale cigarettes directly from a manufacturer of cigarettes, or from a wholesaler, jobber, or distributor outside of the state of

Indiana who is not a distributor holding a registration certificate issued under this chapter.

IC § 6-7-1-17(a) provides:

Distributors who hold certificates and retailers shall be agents of the state in the collection of the taxes imposed by this chapter and the amount of the tax levied, assessed, and imposed by this chapter on cigarettes sold, exchanged, bartered, furnished, given away, or otherwise disposed of by distributors or to retailers. **Distributors who hold certificates shall be agents of the department to affix the required stamps and shall be entitled to purchase the stamps from the department** at a discount of one and two-tenths cents (\$0.012) per individual package of cigarettes as compensation for their labor and expense. **(Emphasis added).**

IC § 6-7-2-7 provides:

(a) A tax is imposed on the distribution of tobacco products in Indiana at the rate of:

- (1) twenty-four percent (24 [percent]) of the wholesale price of tobacco products other than moist snuff; or
- (2) for moist snuff, forty cents (\$0.40) per ounce, and a proportionate tax at the same rate on all fractional parts of an ounce. If the tax calculated for a fractional part of an ounce carried to the third decimal place results in the numeral in the third decimal place being greater than four (4), the amount of the tax shall be rounded to the next additional cent.

(b) The distributor of the tobacco products is liable for the tax imposed under subsection (a). The tax is imposed at the time the distributor:

- (1) brings or causes tobacco products to be brought into Indiana for distribution;
- (2) manufactures tobacco products in Indiana for distribution; or
- (3) transports tobacco products to retail dealers in Indiana for resale by those retail dealers.

(c) The Indiana general assembly finds that the tax rate on smokeless tobacco should reflect the relative risk between such products and cigarettes.

IC § 6-8.1-10-9 further provides, in relevant part, that:

(a) As used in this section:

- (1) "Dissolution" refers to dissolution of a corporation under [IC 23-1-45](#) through [IC 23-1-48](#), [IC 23-17-23](#), or [IC 23-17-24](#).
- (2) "Liquidation" means the operation or act of winding up a corporation's affairs, when normal business activities have ceased, by settling its debts and realizing upon and distributing its assets.
- (3) "Withdrawal" refers to the withdrawal of a foreign corporation from Indiana under [IC 23-1-50](#) or [IC 23-17-26](#).

(b) The officers and directors of a corporation effecting dissolution, liquidation, or withdrawal shall do the following:

- (1) File all necessary tax returns in a timely manner as required by this title.
- (2) Make all tax payments due or determined due to the department or a county treasurer in a timely manner as required by this title.
- (3) File with the department a form of notification within thirty (30) days of the issuance of a certificate of dissolution, decree of dissolution, the adoption of a resolution or plan, or the filing of a statement of withdrawal. The form of notification shall be prescribed by the department and may require information concerning:
 - (A) the corporation's assets;
 - (B) the corporation's liabilities;
 - (C) details of the plan or resolution;
 - (D) the names and addresses of corporate officers, directors, and shareholders;
 - (E) a copy of the minutes of the shareholders' meeting at which the plan or resolution was formally adopted; and
 - (F) such other information as the department may require.

The department may accept, in lieu of its own form of notification, a copy of Form 966 that the corporation filed with the Internal Revenue Service.

(c) Unless a clearance is issued under subsection (g), for a period of one (1) year following the filing of the form of notification with the department, or the filing of all necessary tax returns as required by this title, including the final tax return, whichever is later, the corporate officers and directors remain personally liable, subject to [IC 23-1-35-1\(e\)](#) or [IC 23-17](#), for any acts or omissions that result in the distribution of corporate assets in violation of the interests of the state or a political subdivision (as defined in [IC 36-1-2-13](#)). An officer or director held liable for an unlawful distribution under this subsection is entitled to contribution:

- (1) from every other director who voted for or assented to the distribution, subject to [IC 23-1-35-1\(e\)](#) or [IC 23-17](#); and
- (2) from each shareholder for the amount the shareholder accepted.

(d) **The corporation's officers' and directors' personal liability includes all taxes, penalties, interest, and fees associated with the collection of the liability due the department or the county.** In addition to the penalties provided elsewhere in this title, a penalty of up to thirty percent (30 [percent]) of the unpaid tax

may be imposed on the corporate officers and directors for failure to take reasonable steps to set aside corporate assets to meet the liability due the department or the county.

...

(i) This section does not limit the liability of a responsible corporate officer for withheld income taxes or collected gross retail taxes.

(Emphasis added).

In this instance, Taxpayer/Company stated that it agrees with the Department's proposed assessment concerning its tax liabilities and it does not protest the assessments against Taxpayer. Taxpayer's shareholders/officers, however, assert that they should not be held personally responsible for Taxpayer/Company's tax liabilities because the tax liabilities at issue here are not "sales tax" or "withholding tax," which specifically states that the responsible officers remain personally liable.

The Department must respectfully disagree. IC § 6-8.1-10-9 specifically states that a corporation's officers remain personally responsible for the corporation's tax liabilities, which include "all taxes, penalties, interest, and fees associated with the collection of the liability due the department." The same provision also "does not limit the liability of a responsible corporate officer for withheld income taxes or collected gross retail taxes." Since Taxpayer/Company admits its tax liabilities, its shareholders/officers remain personally responsible pursuant to IC § 6-8.1-10-9.

In short, the protest of Taxpayer/Company's shareholders/officers is respectfully denied.

FINDING

The protest of Taxpayer/Company's shareholders/officers is respectfully denied.

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